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# INFORMATION

F O R

His GRACE the Duke of  
QUEENSBERRY and Do-  
VER, and Mr. ALEXANDER  
M'KENZIE, one of the  
principal Clerks of Session.

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THE FORMATION

His Grace the Duke of  
Gloucester and Do-  
ver, and Mr. Alexander  
M. Kenzie, one of the  
Principal Clerks of Session.



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MARCH 24th, 1729.

# INFORMATION

F O R

His Grace the Duke of QUEENSBERRY and DOVER, Vice-Admiral of SCOTLAND, and Mr. ALEXANDER M'KENZIE his Deputy upon Part of the *North* Coast,

A G A I N S T

The Directors of the EAST INDIA Company of the Chamber of ZELAND, and Mr. WILLIAM DRUMMOND their Factor.



HE said Mr. *Alexander M'Kenzie*, having got Information from the Island of *Barra*, in the Month of *May* last, that there was a Ship which seemed to be of a considerable Bulk, wrecked and broke to Pieces, upon the Rocks of the Coast of that Island; That every living Creature that was aboard the Ship had perished, as necessarily they must have done, considering the Nature of the Place, and Deepness of the Water where the Fatality happened, and that the whole Cargo was sunk



at Sea; He thought it necessary, for surer and better Intelligence, to send a Gentleman to the Island, skilled in Matters of that Kind, who could make just and true Discoveries of the Wreck, and whether there might be Hopes of recovering any Part of it. And in a short Time after, Mr. *John Gordon* a Merchant, who was then employed by the *Dutch East India Company* in Absence of Mr. *Drummond*, acquainted Mr. *M'Kenzie*, that he had Information that a *Dutch East India Ship* was lost on the Island of *Lewis*; Upon which he told Mr. *Gordon* all the Accounts he then had of the Wreck at *Barra*; and in Case it should happen that the Ship he had Intelligence about, should prove a Ship belonging to the *Dutch East India Company*, he offered to contribute his Assistance towards their Service, for the Recovery of so much of the Cargo as could be recovered, providing they would furnish him with a sufficient Sum of Money or Credit to enable him to prosecute such an Undertaking; which, from his Knowledge of the Situation of the Place, its Distance, the Danger and Unaccessibleness of the Coast, the Temper and Manners of the Inhabitants of those Islands, who, it must be owned, are pretty much in a State of Barbarity, knowing no Law, and scarce any other Sovereign than their own Master, he was well assured could not be gone about without a very great Charge, far more than was proper for him to adventure upon at his own Risque; and no Doubt he expected such a Premium as the Labour, Danger, and other Inconveniencies of such a Service might deserve. Concerning which Offer of Mr. *M'Kenzie's*, Mr. *Gordon* assured him he wrote to the Managers for the *Dutch* at *London*; and upon the Return of the Gentleman sent to *Barra*, Mr. *M'Kenzie* gave Mr. *Gordon* a full Information of what he had learn'd of the Wreck, and a Copy of the Memorial he had sent to his Grace the Duke of *Queensberry*, to be transmitted to the Company, with a new Assurance of his Willingness to serve them on the Plan formerly proposed. And this second Offer was sent by Mr. *Gordon*, with the Memorial, to the same Persons.



IT



IT must be obvious to every thinking Person, that the *Dutch*, nor no other Strangers, could possibly, without such Assistance, have recovered one Shilling's Worth of any Goods wreck'd in that Place; not having a particular Knowledge of the Coast, further than any but those who live near it can have, it must have been Folly for any Strangers to have adventured to ly off that Coast with any Vessel, in Quest of the Goods; The Consequence must only have been a second Wreck, and the throwing away so many more Lives. That they would have had any Assistance from the rude Inhabitants, was a Thing not to be dream'd of; but on the Contrary, without a greater Force than 'tis believed they could have thought proper to send there, they must have been pillaged of every Thing they might have recovered. 'Tis doubted, if any Person from *Holland*, could have been able, upon that Coast, to have fished up any Thing of what was lost, supposing the Law of this Country had intitled them to fish for it: Or, rather, it is a Matter out of Doubt, that all the Skill that any of them have yet shown in that Way, would have been available for nothing; The Impetuosity of the Sea, and Difficulty from the Rocks, is such, that the Matter could admit of no Delay; there was no attempting any such Thing in the Winter Season, and the Storms of a few Weeks must have buried the Cargo, so as to have made it irrecoverable by any Art. All which Considerations show how friendly and favourable a Part Mr. *M'Kenzie* acted, as he had Acquaintance and Relations in those Islands, and a great many Friends in the neighbouring Main Land, he hoped to be able to procure the Assistance of the Islanders themselves, who knew every Shelve of the Rocks. He likewise believed his Friends in the Neighbourhood would assist him with such a Force, as would enable him to repel the Violence of the Inhabitants, if any should be offered. He had some Knowledge of Mr. *Row*, the only Person whom he had Reason to believe, by the Help of that Engine for diving, which he hath contrived, and for the Use of which he hath an exclusive Patent from the Crown, for a Term of Years, could be able to recover any Thing at all. He had  
some

Some hopes, tho' no Certainty, of perswading him to make an Attempt: But then he foresaw, that the Premium demanded would be so high, that it was not easy for him to engage by himself, notwithstanding those Advantages he had from the Circumstances above noticed, which no Foreigner could have pretended to.

THIS Offer of Mr. *McKenzie's* was intirely flighted; he apprehends for no other Reason, but because the *Dutch* Merchants concerned look'd upon the Thing as impracticable, and not worth While to venture any Charge upon: They did indeed seem inclined to take the Advantage of any who should attempt the Recovery of any Part of that Cargo; since now they themselves inform, That they forthwith gave Orders to prosecute their Right, *that is*, To endeavour to draw by Law, any Thing that should be saved by the Art and Industry of others; but no such Thing yet seen or heard of, as any Order to attempt the Recovery by themselves, or on their own Risque. They have indeed spoke of their having sent some Vessel to view the Coast, and told us, They were inclined to wait for Divers from the *East Indies*. This shews, either how little they knew of the Matter, or how little Hopes they had. Was the Ship they sent able to view and discover, from the Surface, the Condition of the Wreck at the Bottom of the Sea, in so deep Water, among such Rocks? Or, is their *Imperium pelagi* so great, as not only to entitle them to fish for Wreck on the King of *Great Britain's* Coast; but even to command the Storms and raging Sea, nor to bury their Cargo before their Divers should return from the *Indies*? Have they, to this Day, attempted to recover any Part by themselves? If the Value of the Cargo was any Thing like what they have been pleased to name, no less than 80000 *L. Sterl.* all that hath yet been recovered left full Place for the Use of their Art and Industry: But as, in Fact, they could not have succeeded, their Wisdom well directed them, not to follow a vain Attempt. So that indeed, when the Circumstances are considered, were the



the Matter to be determined upon the Rules that concern Dereliction, it must be concluded, they gave their Property up for lost, attempted to follow out the Recovery no more, which is surely Dereliction in the properest Sense.

Mr. *McKenzie* not finding them disposed to enter into any proper Measure ; and being assured, from his own particular Knowledge, as well as by his Information from the Island, That, if an Attempt was not made before the Winter-Season, all Hopes of Success must be lost ; He, after receiving Directions from his Grace the Vice-Admiral, and after advising with such Persons here as he believed knew most of that Matter, did resolve to make an Essay ; and, at first, endeavoured to hire a Vessel for the Purpose ; But not finding any proper for the Use, that would by any Means, undertake it, he was obliged to purchase one ; and, after furnishing it with necessary Provision, he sent her, under the Command of a Master, with the Gentleman who had been formerly at *Barra*, to the *Orkneys*, to find out Captain *Row*, with Orders to engage him in the Expedition ; where the Gentleman laid the Matter before the Captain, with all the Circumstances ; and, at last, prevailed with him to undertake a Trial, but upon Promise and Assurance of his having a fix'd and considerable Share, in case of Success, and be free of all Charge in case of a Disappointment. And the Gentleman sent to Mr. *Row*, being informed by him, That another Kind of Vessel would be absolutely necessary to make Use of when diving, he was accordingly obliged to provide and carry along such another Vessel with him ; and so they, together with such Assistance as Mr. *Row* had, somewhat instructed in his Art, sailed to the Island ; but found it necessary to touch first at the Main-Land that lay nearest to those Islands, where he expected to meet with Mr. *McKenzie*, who had gone by Land from *Edinburgh*, by the Way of the *Highlands*, accompanied by several Gentlemen who were thought necessary for acting under his Direction, in several Parts of his Office of Admiralty, and where they were both to joyn some Number of his Friends and Acquaintance.



quaintances, who would go along to protect them from the Violence of the Inhabitants. And accordingly he carried with him to the Number of One hundred and fifty, besides the Sailers and Divers, all upon his own Charges, whom he kept and maintained upon the Island, for about the Space of Six Weeks.

DURING that Time, Mr. *Mackenzie*, and those he carried along with him, did, with an immense Labour, and the outmost Danger of their Lives almost every Hour of the Day, recover some considerable Effects; as has since appeared, by an Inventory given in to Court, from the Wreck of some Ship, or rather Ships, that had been lost upon that dangerous Coast; which, with a considerable further Expence, he brought safe to *Edinburgh*. And then, tho' the Gentlemen in *Holland*, who pretend to be concerned, had not thought fit to venture any Thing for the Recovery of what they called their own Property, he was immediately served with a Summons before the High Court of Admiralty, concluding a Restitution of the Effects to the Directors of the *East-India* Company of the *Chamber of Zeland*, as belonging to them. And before any legal Evidence was produced in Court, to prove they ever had a Property in such a Ship or Loading, Petitions were presented, praying an Exhibition of Writings, and a Summary Delivery, at least a Sequestration of the Effects. Upon which the High Court gave such Judgment as seem'd proper; and surely no way to the Disadvantage of the *Dutch*, the Claimants. At last, the principal Cause came to be heard, and now Informations on the Debate are to be given in.

IT was insisted on, in behalf of the Plaintiffs, That they were able to prove, The Property of the Goods in question did once belong to them, and were ship'd aboard the *Eagle* or *Adelaar*, *William D' Keyzar* Commander, from the Port of *Middleburgh*, in *March*, 1728. to be transported, for their Behoof, to the *East-Indies*; That tho' the Ship was un-

unfortunately lost, they had neither given away, nor deserted their Right, nor committed any Delinquency, whereby they might be forfeited; and that, by the Laws of this Kingdom, the barbarous Custom of *Robbing*, as they call'd it, the Proprietors of Shipwreck'd Goods, was now justly disallowed, especially when the wreck'd Ship did not belong to a Country, where, by the Law, wreck'd Goods fall to the Publick, or those having Right of Admiralty; but where, on the contrary, several Ordinances were made for Relief of such as suffer in that Way, and where the Goods acclaimed were the Property of a very renowned Body corporate, a great Support of that High and Mighty Republick, which is one of his Majesty's firm Allies, and had often proved the Bulwark of Religion and Liberty.

AND in Support of their Claim, they endeavoured first to show, There was sufficient Evidence of the Property of the Goods in Question. 2<sup>do</sup>, That the Law of Nations, and particularly that the Law of *Scotland* was on their Side in this Question, and that thereby they had Right to a Restitution of the wreck'd Goods, whatever Way recovered, they having claim'd within a Year and six Weeks. 3<sup>io</sup>, Which is indeed but a Branch of the second, They endeavoured to prove, that in such a Case the Owners are intitled to a Restitution, by the Laws of *Holland* and *Zeland*.

IN Opposition to this, it was pled for the Defendants, That altho' there was some Ground of Suspicion, arising principally from such Documents as Mr. *McKenzie* had voluntarily communicate to the Plaintiffs Agent, that Part of the Effects recovered might have belong'd to them; yet there was no legal Proof of the Property yet brought. As to what further might be adduced, the Respondents could take no Notice of it before it was brought. 2<sup>do</sup>, That, by the most ancient Law of Nations, and particularly by the Law of *Scotland*, where a Ship is totally wreck'd, the Characteristick of which is, *If no Creature escape out of the Ship alive, the Goods thrown out, or gathered up, belong to the*



*Admiral, or those having Right to the Admiralty, where the Wreck happened, allowing such a Proportion to those who saved or recovered the Goods.* 3<sup>tho</sup>. That this ancient Law of *Scotland* had received no Alteration, except in so far as arises from the 124 *Act*, 9 *Parl. Ja. I.* and that the Pursuers could have no Benefit from that Law, because they are not able to bring themselves under the Comprehension of it. 4<sup>tho</sup>. That this was a special Case, that did not fall under the Comprehension, either of that Statute 1429. nor under any of the Ordinances, Quotations, or Authorities adduced in Behalf of the Plaintiffs, the Goods not having been thrown on Shore, nor found floating on Water, but having been recovered from the Deeps of the Sea, in virtue of a particular Art, and by the Help of a new-invented Engine for the Use, of which Mr. *Row* had a particular exclusive Patent from the Crown; That, in such Case, it might be questioned, if the Goods did not belong to the Recoverer, even exclusive of the Admiral: But that here there could be no Question, where the Admiral and Recoverer concurred; and that the Plaintiffs had given, nor could give no Instance, where, in any Nation, and as little in *Zeland* as any other, wreck'd Goods recovered in that Way had been decreed to belong to the former Proprietors. And, last of all, That the Law, in this Particular, was, by no Means, either barbarous or unjust, but agreeable to Equity, and for the common Advantage even of trading Nations.

AS these were the general Points insisted on, on either Side, the Defendants shall now submit to the Honourable Judge, the Weight of these Arguments adduced by each Party, in Support of their different Propositions. And, in the first Place, with Regard to the Property of the Effects, it was noticed for the Plaintiffs, 1<sup>mo</sup>. That the Bars of Silver had the Arms of *Holland* upon them, and the Name of the Company in a Cypher below: But we apprehend, that is no legal Evidence at all; any Person whatsoever might have put those Arms, and that Mark, upon their Silver



Silver Bars, as well as the Plaintiffs. Foreign Merchants, carrying on a concealed Trade, might have done it; other Merchants in *Holland* might have done the same; so that this, without a closer Proof, is no Evidence at all.

2do, THE Argument from the Coin of the Ducatoons, is of the same Kind; It does not yet appear, otherways than from Assertion, tho' probably it may be true that the Company struck such a Coin in the Year 1728; but we are here speaking of legal Proof.

3tio, THO' it hath been said, That, prior to the exhibiting of any Part of the Subject in Question, the Impression of that Coin in Wax was transmitted from *Holland*, agreeing exactly with that of the Ducatoons, when now exhibited; as also the Envoyce of the Goods ship'd Aboard the *Adelaar*, *William D' Keyzar* Commander, which agrees as to the particular *Species* of coin'd Money, and Number of Bars uncoin'd. The Defendants must be allowed to explain the Fact. Altho' that Impression in Wax might be transmitted before any Part of the Subject was exhibited in Court, yet not before there was an Opportunity for any Person to have got into their Hands some of these Ducatoons to have copied from: Still the Defendants don't pretend they in the least suspect any such Thing was done by the Honourable Directors, the Claimants; but being now in Court, they must speak of legal Proof. And here one Thing is to be remarked, That whatever Probability may arise from such Circumstances, with Regard to the particular *Species* bearing these Characters, if it shall be proved such Characters were truly impress'd by the Plaintiffs, and such *Species* put Aboard a Ship belonging to them, yet that can be no Evidence at all, with Regard to other *Species* or Goods, which bear no such distinguishing Impressions.

AS to the Envoyces, These seem good for nothing, without further Proof; the Defendants can't know by whom they

they are framed, or by whom they are signed, or when. They may mention Ducatoons, Dublockies, and Bars of Silver, and so will the Envoyces of most Ships sent from *Holland* to the *East Indies*; but sure they don't agree in Quantity with what hath been recovered; neither do they mention any particular Coin or Marks: And if this be the true Envoyce of the Ship the *Adelaar*, the Defendants can't see how the Plaintiffs magnify the Value to no less than 80000 L.

AND in the last Place, As to the Writings that have been exhibited by Mr. *McKenzie* the Defendant, one of which is a printed Receipt of so much Money, signed *W. D' Keyzar* and *P. Trouillart*, another a printed Inventory of Books and Maps; they add nothing to the Evidence at all, because it does not so much as appear that ever these Papers were among the Wreck. Mr. *McKenzie* did exhibit them, and at the same Time told, they were sent him from the Isle of *Wist*; how they were got, or when they might float ashore there is no Evidence. But if they were to be regarded, then some Notice would fall to be taken of other two Papers produced; one intitled *Muster Roll of the Ship the Norbeck*; and the other a List of Names without any Title, and which Names are not pretended to have been the Names of the Crew of the *Adelaar*. As those Writs were sent to Mr. *McKenzie* at the same Time, if they be supposed to have been thrown ashore, then they afford an Evidence, that some other Ship has been wrecked there than the *Adelaar*, and that therefore there remained still an Uncertainty to what Ship the Effects fished up may belong, except where a particular Proof is brought.

THO' the Defendants take Notice of these Defects that are in the Proof, in Point of legal Evidence, yet they don't think it necessary to dwell upon that. What they rely on is, their Defence in Law; and therefore shall proceed, in the next Place, to shew, That by the ancient Law of most Nations, wreck'd Goods belonged to the Publick, and particularly



ricularly by the Laws of Scotland. And as to this, it seems in vain to trouble the Court with Shoals of Authorities; the very Quotations that have been made Use of for the Pursuers, fully prove what hath been look'd upon as the general Law of Nations. They have adduced the Authorities of several Lawyers who condemn the Law and Customs concerning Shipwreck, as a Hardship and an Injustice; but then those very Opinions prove what the general Law of Nations was, altho' they condemn it, and set up their own Opinions in Opposition to what the Consent of Nations hath receiv'd. The *L. 9. ad Leg. R. de factu*, proves that this was Law. The Constitution of the Emperor *Constantine* contain'd in the Title of the *Cod. de Naufragiis*, tho' it in a great Measure repeals the ancient Law on this Point, yet still it is an additional Evidence what the Law truly was.

AND here it must be observed, that this Constitution, no more than the other Authorities brought for the Pursuers, don't at all concern the Case in Hand. It is a Question, if the Emperor had any Eye to what we call a total Wreck, where all the Persons that were aboard, are los'd; 'tis more probable, from the Manner of trading in those Days, that he had only in View, the Case where the Ship was wrecked, and the Persons, at least, some of them saved: And altho' the Pursuers pretended, that the 3d *L. De Naufragiis*, respecteth the Case where all the Persons perished, the direct Contrary is evident from the Words; for there the *Navicularius* is expressly suppos'd to be saved, that is, *Is qui navem regit*. And the Remark the Gloss makes upon this very Word, may be noticed, *Navicularius aliquis qui evasit*. And the Gloss upon the Word *Liberis* in the same Law, is in those Terms, *Qui forte erant in nave cum aliis*. So that that Law does, by no Means, relate to a Case, where no Person escap'd alive, but only where the *Universi nautæ* were los'd, excepting the *Navicularius*. But whatever be in that, this seems most plain, that the Constitution does not relate to Wrecks recovered in the Way the Effects in Question were, but only to Goods accidentally thrown out, what we



we now call *Jetſom* and *Floatſom*; and this the very Words of the Constitution demonſtrate, *Si navis expulſa fuerit ad littus, vel ſi quando aliquam terram attigerit*: Which Words ſeem choſen to exclude the Caſe of Goods ſunk at Sea. And tho' it muſt be owned, That the Art of Diving was in ſome ſmall Meaſure known in very early Times, as appears from *Lucan*, and others of the Poets; yet that was no other than the common Diving in ſhallow ſmooth Water, in which, when Goods were wreck'd, the Owners might have ſome Hopes of Recovery, and retain the *Dominium animo*; But where a Ship is wrecked *in alto mari*, it is impoſſible to ſuppoſe the Owners in that Caſe retain the Property, ſo much as *animo*. Reason teaches, that they are then look'd upon as loſed; they become (if we may ſo ſpeak) the Property of the Sea, and of Conſequence belong either *primo occupanti*, if, in ſuch Parts of the Seas as are reckon'd to have no Proprietor; but if, within ſuch Part, over which the Property of any Prince is reckon'd to reach, then they muſt of Courſe fall under the ſame Property.

*ARGENTREUS*, upon the Cuſtom of *Britain*, Article 56. No. 54, tho' he, with others, condemns the Law concerning Wreck, yet he ſays, *Tamen mirum eſt Conſenſu pene orbis totius provinciarum & regnorum obtinuiſſe, nec ſolum Britannia et cætera littora Gallica, ſed et Anglia, Hiſpania, Romania, et finitima ea utuntur*. In the ſame Manner, *Rebuffus ad Constitutiones Regias Proemio, Gloſs 5. N. 74. Auth. Cod. De furtis*, Tho' he approves of the Cuſtom of reſtoring wreck'd Goods, yet he adds, *Tamen de Conſuetudine generali non ſervatur, ſed quando fit naufragium, dominus territorii occupat illa bona tanquam oberrantia, quæ vocant Eſpava*. *Griphander de Inſulis, Cap. 31. N. 100. De his naufragorum bonis invaluit Conſuetudo apud maritimos, quæ in prædam cedunt illis ad quorum fines naufragia ſunt, alicubi, etiam hoc juſ regale ſpectans ad Dominium loci*. And the ſame Author takes Notice of what is deliver'd by *Bodinus, De Repub. Lib. 1. Cap. ult.* upon the ſame Subject; and the famous Caſe there quoted, *Quo jure uſus*  
Magiſter

*Magister equitum in Gallia legato Cæsaris coram Henrico 2do. Duas naves ad littus ejectas, et a Jordano Urfino captas, repetenti respondit, ea quæ ad littus ejecta sunt, gentium omnium jure ad principes qui littoribus imperarent pertinere. Selden in his Mare clausum, Lib. 1. Cap. 7. notices this to be the Law of England, Sicily and other Nations; and that even appears from their ancient Statutes, such as the Act 4th. An. 3. Ed. 1. and Cap. 11. An. 17. Ed. 2. And tho' later Statutes have laid down other Rules concerning stranded Goods, this rather confirms the Law as to total Wrecks. The Authority of *Brañton*, Lib. 1. Cap. 12. might likewise be adduced; and of *Cook* himself, who seems to push the Matter further, since he makes, what we call *Lagan*, which in all Cases, is not Wreck, to belong to the Admiral. *Cowel* in his Instit. of the *English* Law, likewise that of Wreck, all falls to the King, or to the Lord that hath the King's Power. *Mornacius* observes this to be the Law of *France*, in his Explication of the *Lex Rhodia*, and makes a Distinction betwixt Goods cast for lightning the Ship, and Goods wreck'd with the Ship. Where they are wreck'd, he says a Third Part must be given to the Savers, a Third to the Admiral, and a Third to the Fiscal, that it seems being the Partition customary in *France*.*

BUT the Defendants incline to avoid lengthening this Information with foreign Authorities, the rather that our own Law is plain on this Point, as appears in the first Place, from the Cap. 25. of the Statute of *Alexander II.* which supposes the Law of Wreck, and that in all such Cases, the Goods belonged to the King; but introduces the Limitation, that a Ship shall not be looked upon as Wreck, where any Creature escapes alive. *Skene de Verb. signif.* hath those plain Words, which need no Explication, "Wreck  
" of the Sea in Words specified in the Laws and fundry In-  
" festments, which signifies Power, Liberty and Prerogative  
" competent to the King, or to any Person to whom the  
" famen is granted by him be Infestment, or any other  
" Disposition to intromit and uptake sick Goods and Gear,



" as are Ship-broken, or falls to him be Escheat of the  
 " Sea ; whilk Liberty is as competent and profitable to  
 " him, who is infect with Wreck, as it might be to the  
 " King himself, Giver thereof ", *Quia Wracta pertinet ad*  
*dominum regem, & Wracta competens vassalo, ex donatione re-*  
*gis, pari jure aestimantur.*

BALFOUR in his Practiques, Book of Sea Laws,  
 Tit. Anent the Admiral and his Office and Jurisdiction, and  
 of the Right pertaining to the King, and to the Admiral of  
 Merchandize, that shall be won and saved out of the Sea,  
 says, " And sicklike of all Ships, Goods and Merchandize  
 " that is perished and won afloat in the Sea, and generally of  
 " all that whilk beis passed to the Ground of the Sea, and by  
 " Force or Engine drawn out and won, and generally of  
 " all that whilk is won, an Third of all pertains to him or  
 " them that draws out or saves it ; another Third to the Ad-  
 " miral, and an other to our Sovereign Lord the King ".  
 And from the same Author, it may likewise be observed,  
 that in all the Stipulations, he takes Notice of to have pas-  
 sed betwixt *England* and *Scotland*, concerning Ship-Wrecks  
 of either Nation, the only Case where Shipwreck'd Goods  
 were to be restored to the Owners, was where Persons  
 came ashore alive.

BUT there is the less Need of recurring to loose Opini-  
 on, that the Matter is absolutely settled by positive Statute,  
 to wit, the forecited 124 Act, 9 Par. Ja. 1st. anent Ships  
 that breaks in this Realm. ' Item, It is statute and ordain-  
 ' ed, That Ships that breaks in this Country, the Ship and  
 ' the Goods shall be escheat to the King, gif they be of thae  
 ' Countries, the whilks uses and keeps the samen Law of  
 ' broken Ships in their awin Land ; and gif they be Ships of  
 ' any Land that keeps not that Law, they shall have the  
 ' samen Favour here, as they keep to Ships of this Land,  
 ' broken with them.' This Act is indeed the governing  
 Rule in *Scotland* to this Day, and in Part it seems to limit  
 the Law concerning Wrecks, in so far as it enacts a Restitu-  
 tion



tion to Merchants of those Countries, who observe the same Thing with Regard to Ships belonging to *Scotland*; and in Part it may seem to extend it, since it makes no Difference betwixt the Case where Persons escape alive, and the other where they do not; and our Decisions seem to have differed upon the Explication of it, as will appear by a Comparison of the Case observed by *Durie*, where there was found to be no Wreck, when an Ox escaped alive. And the other Case in the 1674, betwixt the Earl of *Crawford* and the *Flanders* Merchant, where, notwithstanding of the Mens escaping, the Goods and Ship were found to be a Wreck, if such was proved to be the Law of *Flanders*; as to which a joynr Proof was given: But here that happens to be no Part of the Question, since no living Creature is pretended to have escaped, and so the Wreck is undoubted: But those Decisions are noticed as a further Confirmation of the general Point, That by the Law of *Scotland*, Goods wreck'd belong to those that have the Right of Admiralty, only under the Exception introduced by the said Act *Ja. I.* And so the next Point to be examined, is, How far the Pursuers bring themselves under that Exception, after taking a very short Notice of some Authorities that have been adduced on their Behalf, as somewhat contradictory to this general Position we have laid down as the Law of *Scotland*.

AND in the first Place, as to the whole Quotations from *Grotius*, *Zuglerus*, *Mornacius*, in Short, every one of them quoted for the Pursuers, it hath been already noticed, which will serve for Answer to all of them. That altho' they are justly quoted as so many Opinions against the Equity of the Law, yet they directly prove that such is the Law, and the received Law of most Nations; and the Question here is, not concerning the Justness of the Law; but whether it be Law or not, tho' even the Justice of the Thing, in so far as regards this particular Case, will afterwards fall to be examined.

AS to the Quotations from the Laws of *Oleron*, in the first Place, however they may have been observed in the *Mediterranean*, 'tis plain they never have prevailed universally in this Point, and not even in *France*. But, 2<sup>do</sup>, It is material to observe, That even that Law is expressly restricted to Goods that in Part are driven ashore, and the rest floating on the Sea, so as in Effect they may be had for the laying Hands on; but not one Word concerning Goods recovered by Art from the Depths of the Sea, which shows what Reason the Defendants have to distinguish betwixt the one Case and the other, when those ancient Laws do so expressly found the Distinction, and serve as some Explanation, even of the *Rhodian* Laws, and the Constitutions of the Emperors.

AS to the Regulations said to be establish'd by the late King of *France*, in 1681, the Pursuers seem to have quoted them from second Hand, only upon the Authority of *Justice*, whose Authority in all Cases is not to be relied on, as might be shown from many Instances: But it is to no Purpose to take Notice of any late Regulation in *France*, which hath not been adapted into our Law: One Thing is plain by those Regulations, that a very considerable Share is, in all Events, given to the Uptaker, free of all Charges; and if the Pursuers found on these Regulations as Law, it might at least be expected they would agree to submit to the Terms of them; and altho' they can't be the Rule of Judgment, they might perhaps be the Foundation of an equitable Composition.

AS to the Authority of my Lord *Stair*, he establishes the Law as we plead it, and calls the Statute of King *Ja. I.* an excellent Statute; only he runs somewhat wide in his Explanation of the Reason why a Ship is not look'd to be wreck'd if a living Creature escape, with particular Relation to that Decision concerning the Escape of the Ox; and the Reason he gives, is, Because by the Ox the Owners may be known, and from thence draws a false Consequence, That



That wherever the Owners are known, as may be by Whits belonging to the Ship, there there ought to be a Restitution. This Reasoning has no Foundation. First, It is directly contrary to the Act *Ja. I.* which supposes the Owners to be known, and of what Country they are. In the next Place, how will an Ox coming from the most distant foreign Parts, or a Cat or Dog, or a Mouse, if we go as far as the old Statute, discover who were the Owners of the Ship. If it be said that the Proprietors can prove the Property of their Ox, so can they in a much easier Way prove the Property of their Goods, if the Goods appear; and Hundreds of other Circumstances will discover the Owners better than the Escape of the Ox; and therefore, my Lord *Stair's* Reasoning must be owned to be somewhat trifling on this Point. The only true Reason is, That the Legislative inclining to limit the Crown's Right by Ship-wreck, pitched upon this as the Characteristick of a total Wreck, no Creature escaping alive; but did not introduce any such Law, as that there should be no Wreck where the Owners were known.

As to what is delivered by Sir *George McKenzie* in his Observations upon the Act *Ja. I.* it is partly but an Opinion in Opposition to the express Statute. And as to what he says, That by the present Custom of the Admiralty, the Admiral only secures the Goods, and restores them, if the Owner claim them, and proves his Property within Year and Day, being repaid of his Salvage. This is absolutely without Foundation, for no such Judgments appear on Record; yea, the Contrary is plain, as to what happened in his own Time, from the fore-cited Decision in the 1674. in the Case of the Earl of *Crawford*; so that, so far he seems to speak without Book, and this was, in Effect, yielded by the Pursuers, in the Debate, since they at last admitted, That the Act of *Ja. I.* was to be the Rule of Decision; and therefore, the next Thing to be considered, is, how far they bring themselves under the Comprehension of that Act.



AND here the Defendants must beg the Words of the Law may be noticed, *That Ships of any Land, that keeps not that Law, (that is, Do not escheat broken Ships) they shall have the samen Favour here, as they keep to Ships of this Land broken within them.* Where, in the first Place, the Honourable Judge will observe, That this is a Privilege, an Indulgence, or Favour, given contrary to the general Law that prevailed before: And therefore they that plead the Favour, must prove, That they keep the same Favour to Ships of this Land broken with them. 2do. He will please observe, That the Benefit to the Favour is placed upon a Fact, *That they keep the same to Ships of this Land.* It is not enough to tell us, They have some old barren Edicts, or Proclamations, to such a Purpose. The Question comes, What do they keep, and what do they use? If it be true, That they keep such Custom, then it is the Part of their publick Officers, to secure Shipwreck'd Goods, and to restore them to the Owners: But if they suffer private Persons to make Prey of Shipwreck'd Goods, without enquiring after them, then they do not keep the same Favour towards us, they now plead for. And it is not enough to say, They have given no contrary Judgment. It is in vain to expect Judgment in such a Case, where Goods are pillaged into so many different Hands, unless the publick Officer make it his Business to secure them: And so our Law is, and was, That such Goods are to be secured by the Admiral, Sheriff, Bailiff, and other Officers, in the Cases where Restitution is to be made: And therefore, if the Pursuers can't shew, That such has been the Practice of *Zeland*, That the publick Officers have secured, and do secure Shipwreck'd Goods belonging to *Scotland*, and have restored them to the Owners, they don't bring themselves under the Comprehension of the fore said Act: But, as yet, the Defendants have heard of no such Instance given; nay, nor yet one Instance of a Judgment in any Court in *Holland*, in favours of the Owner of Shipwreck'd Goods, where there was a total Wreck; much less of any Instance, where any Goods, recovered by *Dutch-Men* in  
*alto*

*alto mari*, by diving, were found to remain in Property to the Owners.

WHAT was pled in Behalf of the Pursuers, on this Head, was, That unless the Defendants could bring a Proof, That the Law of *Holland* is as barbarous, as it is proper for their Purpose in this Instance it should be, the Presumption stands in favours of the Pursuers, since an unreasonable Custom is never to be presumed; especially contrary to the general Practice of other Nations.

THE Defendants, once for all, will be excused to observe, That they don't think it worth While, to notice those empty Sounds of barbarian Customs, Inhumanity, Cruelty, and a great Deal of that Kind, which are indeed high Words, but no more. Softer Terms might be used, when it is admitted, That such, once at least, was the universal Law of Nations. When it is likewise admitted, That, in Part, such is the Law of this Kingdom at present; and when it might be considered, That if they can't shew the Usage in *Holland* is contrary towards Foreigners, the Cry of Barbarity returns with Interest upon themselves. Neither have the Defendants thought it proper to take any Notice of the Encomiums upon their High and Mightinesses the States of *Holland*, which, no Doubt, they justly deserve; neither of his Majesty's Name having been brought into this Question; They apprehend these Things are improperly brought in; That neither his Majesty's Name, the Firmness of Allies, nor the Protestant Religion, have any Thing to do in a Question amongst private Persons, where the Law alone is the Rule of Judgment, and where no By-Considerations ought to take Place.

BUT as to the Presumption now pled, it has no Foundation. It is already noticed, That they who plead a Favour, upon the Usage of their own Country, must prove that Usage. It is admitted by the Pursuers own Council, That



That that Law and Custom, which they call so barbarous, was once the Law and Custom of *Holland*; then, for certain, it is their Part to shew the Alteration made both in Law and Practice. They say, That the Custom of other Nations favours the Presumption; and yet it is plain, from the Authorities adduced both for them and us, That, in most Countries, Wrecks do belong to the Publick.

BUT then the Pursuers went a little further, to prove the actual Law of *Holland*; and, in the first Place, did admit, That it appeared, that anciently, by the Law of *Holland*, Shipwreck'd Goods belonged to the Publick; but that, according to the Authority of *Van Leeuwen*, that came to be altered in the 1443. And it was enacted, That, for the future, Shipwreck'd Goods were to be preserved by the publick Officer, for a Year and Six Weeks, for the Use of the Owners, they paying reasonable Salvage.

BUT as to this, in the first Place, The Authority of a Lawier is no Proof of a Statute. Where is that Act, or the Record of it? 2<sup>do</sup>. If there was such an Act, we deny it hath been kept or observed, particularly with Regard to the Subjects of *Scotland*. 3<sup>io</sup>. That Act, as set forth by him, is not to the Purpose; for it plainly concerns only Goods thrown ashore, which, in Effect, are not perished; but not Goods sunk *in alto mari*, which are look'd on as perish'd, and can't be preserved by the publick Officer.

IN the next Place, The Pursuers took Notice, from the Book of *Placaerts*, That, in the 1476. among the great Privileges indulged by *Mary of Burgundy*, to the Countries of *Holland* and *Zeland*, it is one, That whenever Ships perish at Sea, by whatever Cause or Occasion, then every Person may freely apprehend, and apply to his own Profit, his own Goods coming from thence, driving by the Sea, or otherways stranded, and brought on Shore, &c. paying reasonable



sonable Salvage to those who may have found or preserved the same.

**BUT** as to this, first, The Words of a *Placaert*, or Ordinance, as published by a private Hand, without Authority, are not to be regarded as the Words of a Law. Where is the Record of these *Placaerts*? *2do*, If this was a great Privilege indulged to *Holland* and *Zeland*, whereby she abated of her Right in Favours of them, that neither extended to other Foreigners, but was a Privilege indulged to them beyond others; neither is it a Part of the Constitution or Laws of the States of *Holland* or *Zeland*, as they now stand. And, *3tio*. It still only relates to *Floatsom* and *Jetsom*, and hath nothing to do with Goods sunk, and recovered in the Manner those in Question were.

**NEXT**, They took Notice of an Edict published by *Philip II.* in the 1574. commanding his publick Officers to bestir themselves, to get into their Possession Shipwreck'd Goods, and to restore the same to the Owners, they paying a reasonable Salvage. But this is liable to the same Objection. The printed Book is no Proof of a Law. That Edict of *Philip's* is now no Law of the States of *Holland*. The Edict does not concern Goods recovered in this Manner: Tho' it speaks of fishing, yet the plain Meaning is, fishing of *Floatsom*. And we do still deny, That such is now the Practice of *Holland*, with Regard to *Scots* Ships, That the publick Officers do take Care of the Goods, and restore them. And the same Observations will serve as to the other *Placaerts* quoted by the Pursuers, with this further Addition, That they are not Laws of *Zeland*.

**THE** Extract which the Pursuers have produced from the Statutes of *Zeland*, the Authentickness of which the Defendants can't know, seems to be of little Use in this Case. Supposing it to be authentick, it is no more than a Statute in Imitation of *Adrian's* Constitution, for preventing Rapine upon Shipwreck'd Goods, tending equally at least,  
for

for Security of the Publick, which, at that Day was the Right of the Earl, if not more, than for the Security of the Owners: But, by the very Words of it, it relates only to Goods floating on the Sea; which hath little to do with the present Case. Nor is the Citation that was made Use of from *Peckius*, together with *Ninnius's* Observations upon it, any stronger. They both concern Goods floating, what they call, *Vanzie driften, merces colligendas seu collectas*; which does not come up to the Case in Hand. Such Goods are not properly perished, but straying; and he who gets them into his Custody, is indeed no more but a Keeper, and so less Wonder if a Salvage only be due.

THE Authorities adduced for the Pursuers from the Dutch Lawiers, such as *Voet*, *Gronowigen*, are no more than Recapitulations of some of those Edicts already noticed; such as that of *Mary of Burgundy*, and *Philip II.* The most that *Voet* seems to say of it, is, That the Rigidity of the old Law hath, by Degrees, wore out; which amounts to no more than this, That it remains in the Breast of those having Power in the several Provinces, to order Restitution of Shipwreck'd Goods, or not to order it, as they think fit: But what the Defendants want to see, is, in the first Place, Any Law made to this Purpose by the States, according as they stand in their present Constitution. 2<sup>da</sup>. They want to see it proved, That such hath been the Practice with Regard to Foreigners, particularly the People of this Kingdom: And it is pretty strange, That not one of their Lawiers give a single Instance to that Purpose. It may be probable, That Restitution will be made to the Inhabitants of the Provinces, whose Goods are Shipwreck'd on their own Coasts; and it is far from clear, That any of their Edicts import any more. The Statute of *Mary of Burgundy* plainly points that Way. And this seems to be confirmed by *Paulus Voet*, in the Passage that was quoted for the Pursuers, when he says, *That was a great Privilege granted by Mary of Burgundy to Holland and Zeland.* But the Pursuers always fail in the material Point. The  
Exe-



Execution of such Kind of *Placcerts*, or Orders, which are but a Sort of politick Orders, rather than Laws, and the Application of them, is in the Breast of the State Ministers: But what is wanted, is a Proof, That such is the Rule of Judgment, That such is the Practice, and That the Merchants of *Scotland* have been favoured, and habitually favoured that Way.

A S to the Extract of the Resolution of the States of *Zeland*, anno 1702. produced in *Dutch*, with a Translation, it seems to be somewhat mank, and probably, an Extract of the Case that was then before their Lordships, might have been of more Use, than this which they call an *ex superabundanti* Resolution or Declaration. It seems so dark, according to the Translation, that the Defendants scarce understand what it means; They truly do not understand what that is, *That no Goods reclaimed by the Proprietors, in name of the Earldomship, should be liable to any Quota or Lord's Right.* But this is very plain, That it relates only to stranded Goods, and *Floatsam* Goods fished; but has not the least Reference to any such Case, as that which gives Occasion to the present Question. And whether that Resolution concerns only Merchants of their own Country; or likewise Foreigners, is a Thing quite couched in the Dark, and cannot appear from the Words of it. And the Defendants must always insist, That, according to the Act of *James I.* it is incumbent on the Pursuers, to shew, That the Usage of restoring Shipwreck'd Goods, hath been kept and observed with Regard to Ships coming from *Scotland*, which, it is believed, cannot be shewn, notwithstanding of many Wrecks, that, even of late Years, have happened to *Scots* Ships upon the *Dutch* Coast.

I T was indeed pretended for the Pursuers, That the Act, *James I.* hath Relation to the Law of the Country, and not to the Practice of private Persons; and that therefore, if the Law of *Holland* stands fair for them on the Point, the Practice must not be regarded; no more than it should be, if, That an innocent Person might be murdered, be-  
D cause



cause he was of the Country where a Murderer lived ; or, That one *Dutch-Man* might be robbed, because another had robbed a *Scots-Man*. But, with great Submission, these again are strong sounding Words. If the Defendants were to follow the Pursuers in that Kind of Reasoning, they might, with Safety, aver, That, if there were a Law allowing to kill or rob Persons of such Countries, as practised the killing and robbing of *Scots-Men*, as oft as they found them ; the Slayer or Robber of one of such a Country, as habitually treated *Scots-Men* in that Way, would fall to be acquitted, if tried upon such a Statute. But why should absurd Cases be put, only for the Sake of a strong Sound ? The Act of Parliament, which is the Subject of the present Question, is plain enough of itself. It directly speaks, not of Countries that publish such and such Edicts ; but of Countries that *keep and use* such a Law : And if Twenty thousand Edicts were published, as strong as the Pursuers could frame them, if they can't shew such Usage is followed towards *Scots Ships*, they don't come under the Comprehension of that Law. Neither do the Defendants speak of the concealed Practice of private Men. If the Edicts, so much valued and insisted on by the Plaintiffs, concern this Case, then it is plain the publick Officers would be bound to take Care of the Shipwreck'd Goods : But if no such Thing appear to have been done, with Regard to Ships of this Country, then, for certain, the publick Usage of *Holland* or *Zeland* is not such, with regard to us, as the Plaintiffs, on this Occasion, would have us fancy.

THE fourth Thing insisted on for the Defendants, was, That this was a special Case, falling under none of the Edicts quoted for the Pursuers, and even not under the Act 7a. I. And the first Argument they beg Leave to adduce, in Support of this Position, is, what they hope can't well be opposed by the Crown's Lawiers, who appear for the Pursuers in this Case. They beg Leave to draw it from the Crown's granting an exclusive Patent to Mr. *Ross*, to dive with his new-invented Engine, for Recovery of Wrecks  
sunk

sunk and lost in the Depths of the Sea. If such Goods remain the Property of the Owners, How could the Crown, with any Justice, grant any such exclusive Patent? Could the Crown prohibit Proprietors to use any Engine for recovering their own Property? That seems impossible: And therefore the Pursuers Council must either accuse the Crown of Injustice, in granting such a Patent; or admit, That, by Law, such Goods are look'd upon as perished to the Owners; That they are become (if we may so speak) the *Fetus* of the Sea, and so belong in Property to the Proprietor of the Mother, so soon as they can be brought to the Birth, *that is*, to the Sovereign, and such as have Right of Admiralty from him; for it is upon the Foundation of that Property alone, That the Patent could be granted, or any Restraint laid upon the Fishing of the Goods with any Engine whatsoever.

BUT in the next Place, the Defendants are well founded in their Distinction of this from other Cases. In the first Place, From the Laws of *Oleron*, in the Place already noticed, quoted for the Pursuers, which expressly relates to Goods thrown upon the Shore, and found floating upon the Water; but not one Word of such as are recovered in the Manner that the Goods in Question were. And they make the same Observation upon the Regulations, quoted by the Pursuers, made by the late King of *France*, in the Year 1681. which, as the Pursuers faithfully set them forth, import only, That Ships run a-ground, and Goods and Effects proceeding from Shipwrecks, found at Sea, which is plainly, *Floating*, or upon the Shore, may be reclaimed within a Year and Day. And they humbly insist, That not one of the *Edicts*, *Placaerts*, or *Resolutions* of *Holland*, go further in their Words: And they have called upon the Pursuers, to shew that they have been further extended in Practice; in short, That ever they have been extended to such a Case as this. Now, as it is admitted, That all those Constitutions were Limitations or Exceptions from the former general Law, which the Pursuers call *barbarous*, the



Consequence is, that *Exceptio firmat regulam in casibus non exceptis*: And therefore, since this Case is not excepted, there is no Restitution competent. Nor does the Act of Parliament of James I. extend to such a Case. It speaks of Ships broken, and enacts, *That Ship and Goods shall be escheat, &c.* Which shews, That it even supposes the Ship to be extant, and so the Goods extant, as well as the Ship; but hath no Words that insinuate any Extension, or Relation to Goods perished in deep Water, which were then look'd upon as totally lost; and so not made the Subject of a Law.

IF the Reason of the Thing be considered, the Difference will be plain and obvious. Goods thrown ashore, properly speaking, have not perished, nor are they lost by the Sea, but saved by it; and therefore, it is very easy to suppose a Retention of the Property, *animo*; and indeed not *animo* only, but even *corpore*, since they continue under the Eye of Mankind, and are, as it were, not retained by the Sea, as her own, but voluntarily delivered over to those who think fit to take them into their Custody at Land; but that can never be reasonably thought of Goods sunk and perished in deep Water, and in Places next to inaccessible, and where the Lapse of a very short Time, must make them intirely irrecoverable; there is no supposing a Retention, even *animo*, in that Case, where there is no Probability of Recovery, without so high a Strain of Imagination, that it amounts to no more than a Fiction.

AND here indeed, what *Ulpian* delivers in L. 44. *De acquir. rerum dominio*, may be very appositely applied and submitted to, as a just Rule of Determination, *Qua naufragio amittimus, nostra esse desinere, ait Ulpianus, non statim, sed ubi recipi non possunt, i. e. ubi non est cui credatur aliquis animum Domini retinere.* There *Ulpian* does not put the Matter upon a natural Impossibility of Recovery, altho' he uses the Words, *Ubi recipi non possunt*, but well explains that Expression by the other, *Ubi non est cui creda-*



*credatur aliquis animum Domini retinere*, in other Words, where the Owner had not a reasonable Ground to believe they could be recovered. And if that was not the present Case, the Defendants must submit it to the honourable Court, from the whole Circumstances.

AND indeed there is no small Difficulty in admitting, that such Goods are in the Right of the Crown: Strictly speaking they are not, because they are truly perished, and so are rather *nullius*; yet in another Sense they are the Crown's, because no Body has Power to occupy them, but by the Authority, and in the Right of the Crown; and perhaps the Matter may not be unfily explained by a Philosophical Distinction, that they are *actu nullius*, until they be recovered, but that *potentia* they belong to the Crown; and these deriving Right from him, being the only Persons that have a Power to appropriate them, by Recovery and Search within his Domains and Property.

AND this leads to the last Consideration proposed, *to wit*, The Equity and Justice of the Thing, with Regard particularly to the present Case, and whether there be either such Injustice or Barbarity, as the Pursuers are pleased to complain of in the Law, that Goods recovered in this Manner, should belong to those who recover them, under the proper Authority of the Admiral. And here the Defendants must observe in the first Place, That it hath been admitted by the Plaintiffs themselves, That even to this Day, in all Countries, if wreck'd Goods be not claimed within the Year, or Year and Day and six Weeks, that then they belong to those having the Right from the Publick: Now, is it possible to say, That the Lapse of a Year and Day makes the Confiscation, if the Word may be used, just and equitable, which was so hainously barbarous a Year before? Or, does that Lapse of Time, after the Goods are saved, take away the Property more justly than the actual perishing of the Goods *in alto mari*? There is plain Reason and Sense why the one should be look'd upon as losed; but, abstracting  
from

from the Force of Statute, and received Law, there is no Reason in that, that the Lapse of a short Time should transfer the Property of Goods that have never truly perished, but have been preserved.

IF the Case be put upon the Point of Dereliction, there is still less Foundation for that in the one Case, than in the other ; for, sure no Body believes that the Proprietor, who does not claim for Year and Day, does amit it voluntarily ; it must be by Accident, or Want of Knowledge of the Fact ; and therefore, if the Matter be rightly examined, the Cry of Barbarity is no more than a Noise.

2do, THE great Argument made Use of against such Goods being look'd upon as losed to the Owners, is, That Property can't be transferred, without the Delinquency or Consent of the Proprietor. But here again the same Difficulty recurs ; where is the Delinquency or Consent of the Proprietor, where he does not claim for a Year ? Next, the Rule is by no Means universal, for Property may be losed in many Cases by Fatality, where there is no Consent of the Proprietor ; and also in Force of the Provision of the Law, where there is no other Fact or Consent of the Proprietor, but only as he is supposed to know the Law, his Consent is understood to be given to the transferring of his Property, in the Event of its being brought voluntarily, or by Chance, under those Circumstances, in which the Law transfers it to another. Under the first of those Heads, we apprehend, that of Ship-wreck, and the perishing of Goods *in alta mari* comes ; it is not a consensual Transference of the Property ; yet 'tis a casual Amission, an Amission by Fatality, and that is a proper Way of losing Property, as much as an Alienation by Consent. And under the other Head cometh all Captures ; there is no Consent of the Proprietors in such a Case, further than that knowing the Laws of War, he ventures his Ship and Goods to Sea, under the Hazard of losing them, in case of Capture. And if we were to talk according to the nice Rules of the strictest



strictest Justice, it might be called an Iniquity to rob the Goods of private Persons, because of a Difference betwixt two States: But such Ways of reasoning take no Place, and the Case is just the same in the Matter of Ship-wreck; he who ventures his Goods to Sea, is supposed to know what the Law of those Countries is, where Wrecks belong to the Publick, or *Occupanti*; and so puts them to Sea, under the Hazard of their being subject to that Law, in case the Ship be broke on a Country where such Law obtains. So that here is as much a Consent to the Transference of the Property in that Event, as in any other Case where Property is transferred by the Force of the Law. And if those Things are rightly considered, 'tis vain to say, That a Thing of this Kind, received by the universal Consent of Nations, is so cruel and barbarous. Universal Consent introduces an Equality; where there is an Equality, one Nation hath an equal Chance with another; and tho' private Persons suffer in Consequence of some of those Laws of Nations, that is look'd upon as nothing, however it may give problematical Lawiers a Fund of Declamation, from what they are pleased to set up in their own Fancies as fundamental Rules of Justice.

BUT then, *3tio*, When we come nearer to the particular Case in Hand, where is either the Injustice or Barbarity? We still insist upon it, that in common Reason, without the Aid of Fictions, Goods perished at Sea, must be look'd upon as lost, and in this Case particularly, considering the Situation, 'tis obvious that the Plaintiffs could by themselves have recovered nothing; Where then is the Injustice, that what is plainly lost to one, and irrecoverable by him, that it should be in the Power of an other, by singular Art, to appropriate it to himself? It is rather agreeable to the common Rule in Law, *Quod tibi non nocet & alteri prodest, invidere non debes*; yea, we apprehend it is for the common Advantage of Nations, that Encouragement should be given to Recoveries and Appropriations of this Kind. It must be admitted that it is more the Advantage

rage of Nations in general, that a Cargo of this Kind should be recovered, than if it should be buried for ever in the Bottom of the Sea; and therefore such Rules are reasonable as tend most to the Encouraging such Recoveries. Now it may easily be submitted to the Judgment of any unbiassed Person, if any Man alive, in any Case, would subject themselves to the Hazard of their Lives every Hour for so many Days, lay out so vast Expence as is necessary for such Undertaking, and particularly was necessary in this Case, only out of Publick Spiritedness, or to save the Property of unknown Persons? No Philosophy will persuade that this is possible: Does any Body imagine, in this very Case, that the Defendants would have ventured to do what they did, upon the Chance of a Remuneration or Reimbursement from the Plaintiffs, or, which is worse, upon the Consequences of a Law Suit? If that were Law, that Wrecks of this Kind are not lost to the Owners, but must be restored, then 'tis obvious they would be lost for ever, and never recovered; and therefore 'tis highly consistent with Reason and Justice, and for the common Advantage of Nations, that particular Persons should have a Power of appropriating to themselves, if they will risque their Lives in the Doing, and have acquired the Art, what is lost to former Owners, and what otherways would not be recovered at all.

THE Pursuers endeavoured to prove, That the Constitutions and Authorities quoted by them, extended to such a Case as this, as well as to Goods thrown upon the Shore or floating on the Sea; yea, they push'd the Matter so far, as to pretend, That the Property ought to remain in a stronger Manner with the ancient Proprietor, in the Case of Goods sunk at Sea, than where they are thrown on Shore; which we acknowledge seemed a very odd Position, but was not at all made out, nor, as is believed, can it ever be.

THEY observed, That the Grant of the Dutchess of Burgundy extended in Words to Goods stranded, as well



as Goods driven by the Sea; and that the Edict of Philip II. mentions Goods fished. But this is already obviated. Goods stranded are not perished or sunk *in alto Mari*, they are Goods thrown on Land or Banks, and thereby saved; and we all know a Ship may be stranded, and not wreck'd; and 'tis obvious that, by Fishing in the Edict of Philip, nothing is understood but the Fishing of Goods floating.

THEY also took Notice of what Cook observes in the Explication of *Flotsam*, *Jetſam* and *Lagan*, which hath been already hinted at; and of what is said by *Bracton* and *Britton*, That the Crown hath not Right to either of these, *sed occupanti cedunt, quia non est aliquis qui inde privilegium habere possit*, from whence they endeavoured to draw a very erroneous Consequence, That Goods thrown on Shore were looked upon as more subject to Echeat, than those taken up at Sea. But, with great Submission, these Passages make intirely against the Pursuers; for 'tis plain *Bracton*, nor none of them ever dream'd of the Property's remaining with the first Owner, but puts the Question only betwixt the Crown and the Occupier, and seems to prefer the Occupier, because he thought the Crown had no Privilege *in alto mari*; but then, as he says, *cedunt ea occupanti*, this destroys the Pretence of the former Owners, and in the strongest Manner establishes what we pled, the Difference betwixt Goods perished *in alto mari, quæ acta sunt nullius*, and Goods thrown to Shore or floating on the Shore, which are in Effect in the natural Possession of him who takes them into Custody.

THEY founded also on the Authority of *Pinnius*, who uses indeed the general Words *rebus extractis de mari*, and says, They may be repeted by the Owners; but what are the *extracta de mari*, nothing else but Goods hal'd out of the Water when swimming, or seen in the Shallows; but not the least Appearance that he had in his Eye Goods perished

ed in this Manner, *in alto mari*, and recovered by extraordinary Art.

*VANDERGRAVE*, an other Authority cited, uses the Words *excerpta e mari*; but what is that again: in plain Scots, Goods pluck'd or pull'd out of the Sea; does that apply to Goods recovered in the Manner those in Question were?

THE Pursuers notice, That the Poets have spoke of Divers in ancient Times, and that is true; but the Question is, If either Lawiers or Poets have ever said that what was recovered by such Diving *in alto mari*, was to be restored to the Proprietors? We don't know that they have so, but on the contrary, those Poets seem rather to point at their acquiring to themselves what they recovered in that Manner. At the same Time there is no Appearance in those earlier Days, of Diving in the same Manner and Perfection as some few have now arrived to. And the Defendants can't agree with the Plaintiffs, That there is no Difference in Point of Law, whether the Goods be recovered by a greater Art in Diving, or lesser; they apprehend it is quite otherways. Goods lying at one or two Fathom Water, which almost every Boy could dive for, may, in the Eye of Law, not be reckoned lost, because there is so easy a Prospect of Recovery; yet Goods that are perished *in alto mari*, tho' there may be one Person or two in the World that might be able to recover them, would be look'd upon as lost and perished, and even derelinquished, according to the Rule of *Ulpian* before noticed: And supposing there were any particular Law of some Countries, that made Provision for this Case, yet 'tis sufficient for the Defendants to say, that none of the Laws of *Holland* seem to comprehend it; neither does the Act of *James I.* neither can the Plaintiffs show, that in any Case, Goods recovered in that Way, have in *Holland* been adjudged to Foreign Owners. And the Defendants have been informed, that the contrary was adjudged in



in England, in a Question betwixt some of the Companies there, and this very Mr. Row, who recovered the Goods in Question, tho' at present they are not Masters of the Particulars of the Case.

THE Pursuers have also said, That they have Persons in the Service of the Dutch East-India Company, who could have served them on this Occasion. But, *First*, It is doubted they could. The Crown's Right, and Dominion of that Sea, would have stood in the Way. But, *Next*, Where are they? If they had come, and could lawfully fish, then what they got would have belonged to them, or to the Company; but they appear not yet to have returned from the *Indies*; and so the Justice of the Case comes out thus, even abstracting from the Point of Law. The Plaintiffs got fair Advertisement, and kind Offers of Assistance made them; but, as it seems they expected no Benefit, they attempted nothing, and would venture nothing. They would look on, and behold the Labour of others. If nothing was got, they would have nothing to pay: But, if any Thing was recovered worth While, then they are ready to take the Benefit of other Peoples Skill and Labour. Where the Justice of this lies must be submitted.

THE Plaintiffs indeed conclude, with agreeing, That some Salvage should be paid, *cum impensis mediocribus*, which, in other Words, amounts to this, That they would be willing to pay a small Expence, for the Recovery of what had been saved at an immense Charge. It might, at least, have been expected, That they would cheerfully and thankfully have submitted to the full Expence that had been laid out, besides a handsom Gratification for the Danger and Trouble. However, it is hoped it is in vain to enter upon that. Were we in a Case, where, by the Law, Restitution should take Place, then it would be plain, That, as Mr. *McKenzie* acted as if it had been for himself, and truly

truly recovered what otherways never would have been  
 touched; the outmost Farthing of Expence would fall to  
 be reimbursed, in the first Place; and a Right of Re-  
 tention of the Whole would be competent for it. And,  
 as the Goods were recovered with more Peril than any  
 have been known to be, in a Situation, where otherways  
 the Owners could have had no Hopes, the highest Sal-  
 vage and Premium would be due, that the Maritime Law  
 could allow of.

*In Respect whereof, &c.*



RO. DUNDAS.



THE Plaintiff  
 Some Salvage and  
 which, in other Words,  
 be willing to pay a small Expence for the Recovery of  
 what had been saved at Charge. It might  
 at least have been expected, they would cheerfully  
 and thankfully have submitted to the full Expence that had  
 been laid out, besides a handsome Gratification for the same.  
 got and Trouble. However, it is hoped it is in vain to  
 enter upon that. Were we in a Case where, by the Law,  
 Restitution should be made, there would be no Doubt  
 as Mr. Attorney would be it and I am for making it  
 truly